

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LATASHA N. B.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

Case No. 22-CV-5016-TLF

ORDER REVERSING AND
REMANDING DEFENDANT'S
DECISION TO DENY BENEFITS

Plaintiff has brought this matter for judicial review of defendant's denial of her applications for disability insurance benefits ("DIB") and supplemental security income ("SSI") benefits.

The parties have consented to have this matter heard by the undersigned Magistrate Judge. 28 U.S.C. § 636(c); Federal Rule of Civil Procedure 73; Local Rule MJR 13.

I. ISSUES FOR REVIEW

- A. Whether the New Regulations for Evaluating Medical Opinion Evidence are Partially Invalid
- B. Whether the ALJ Erred in Evaluating Medical Opinion Evidence
- C. Whether the ALJ Erred in Evaluating Plaintiff's Subjective Symptom Testimony
- D. Whether Plaintiff's Residual Functional Capacity ("RFC") is Supported by Substantial Evidence

II. BACKGROUND

In July and November 2019, plaintiff filed a Title II application for a period of disability and disability insurance benefits (“DIB”) and a Title XVI application for supplemental security income (“SSI”), respectively, alleging a disability onset date of June 29, 2019 in both applications. Administrative Record (“AR”) 63, 109, 123, 136.

Plaintiff’s applications were denied initially and on reconsideration. AR 117, 134, 147. Administrative Law Judge (“ALJ”) John H. Goree held a hearing on December 4, 2020, and issued a decision on January 7, 2021 that claimant was not disabled. AR 57–79, 80–106.

Plaintiff seeks judicial review of the January 7, 2021 decision. Dkt. 13.

III. STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s denial of Social Security benefits if the ALJ’s findings are based on legal error or not supported by substantial evidence in the record as a whole. *Revels v. Berryhill*, 874 F.3d 648, 654 (9th Cir. 2017). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (internal citations omitted).

IV. DISCUSSION

In this case, the ALJ found that plaintiff had the following severe medically determinable impairments: fibromyalgia, asthma, hypertension, obesity, residuals status post-hysterectomy and cholecystectomy, depression, and post-traumatic stress disorder (“PTSD”). AR 63. Based on the limitations stemming from these impairments, the ALJ

1 found that plaintiff had the residual functional capacity (“RFC”) to perform sedentary
2 work with postural, exertional, and environmental limitations. AR 66.

3 Relying on vocational expert (“VE”) testimony, the ALJ found at step four that
4 plaintiff could not perform her past relevant work, but could perform sedentary jobs at
5 step five of the sequential evaluation; therefore, the ALJ determined at step five that
6 plaintiff was not disabled. AR 71–73.

7 A. Whether the New Regulations Are Partially Invalid

8 Plaintiff contends the revised regulations set out by the Commissioner in
9 evaluating medical opinion evidence are “partially invalid” because they have deemed
10 the medical source’s relationship with a claimant “irrelevant” and “relieves an ALJ of the
11 duty to address” the medical source’s relationship with the claimant in the ALJ’s
12 analysis. Dkt. 13, p. 2–6.

13 The new regulations listed several factors an ALJ must consider when evaluating
14 medical opinion evidence. Contrary to plaintiff’s contention that the treating relationship
15 is not being considered, one of the factors cited in the rule is the medical source’s
16 relationship with the claimant. See 20 C.F.R. § 404.1520c(c)(3). Though the ALJ is not
17 required to explain how they considered the listed factors, as clarified by the Ninth
18 Circuit, “an ALJ can still consider the length and purpose of the treatment relationship,
19 the frequency of examinations, the kinds and extent of examinations that the medical
20 source has performed or ordered from specialists, and whether the medical source has
21 examined the claimant or merely reviewed the claimant’s records.” *Woods v. Kijakazi*,
22 32 F.4th 785, 792 (9th Cir. 2022) (citing 20 C.F.R. §§ 404.1520c, 404.1520c(c)(3),
23 (c)(3)(i)–(v)). Thus, the new regulations did not render “irrelevant” the nature of the
24 relationship between a treating source and claimant.

1 The Ninth Circuit also clarified, under § 405(a) of the Social Security Act, the
 2 Commissioner has the “latitude ‘to make rules and regulations and to establish
 3 procedures . . . in particular regulations governing ‘the nature and extent of the proofs
 4 and evidence . . . to establish the right to benefits.” *Woods v. Kijakazi*, 32 F.4th 785,
 5 792 (9th Cir. 2022). Thus, the Commissioner has the authority to publish regulations
 6 that guide the ALJ’s and the Appeals Council when they interpret and apply the criteria
 7 for evaluating medical opinions.

8 B. Whether the ALJ Erred in Evaluating Medical Opinion Evidence

9 Plaintiff contends the ALJ erred in discounting the medical opinions of Ms.
 10 Thomas, LPN, Dr. Tackach, and Dr. Harrison. Dkt. 13, pp. 6–10.

11 Plaintiff filed her applications in July and November 2019. AR 63, 109, 123, 136.
 12 For applications filed after March 27, 2017, ALJs must consider every medical opinion in
 13 the record and evaluate each opinion’s persuasiveness, with the two most important
 14 factors being “supportability” and “consistency.” *Woods*, 32 F.4th 785, 791 (9th Cir.
 15 2022); 20 C.F.R. §§ 404.1520c(a). Supportability concerns how a medical source
 16 supports a medical opinion with relevant evidence, while consistency concerns how a
 17 medical opinion is consistent with other evidence from medical and nonmedical
 18 sources. See *id.*; 20 C.F.R. § 404.1520c(c)(1), (c)(2). Under these regulations, “an ALJ
 19 cannot reject an examining or treating doctor’s opinion as unsupported or inconsistent
 20 without providing an explanation supported by substantial evidence.” *Woods*, 32 F.4th
 21 at 792.

22 1. Medical Opinion of Ms. Daisy Thomas, LPN

23 In August 2019, Ms. Daisy Thomas, LPN provided a letter addressing plaintiff’s
 24 impairments. AR 806. The letter stated:

1 Latasha [B.] is my patient at LRDC and was diagnosed with (FMS)
2 Fibromyalgia Syndrome. This syndrome can cause widespread body
3 aches, fatigue, nonrestorative sleep, depression, anxiety, mind fog, and
4 poor concentration. Ultimately, it may affect her job performance. The
5 patient did not tolerate Gabapentin, Lyrica nor Tizanidine. However,
6 patient does tolerate Baclofen so far.

7 *Id.*

8 The ALJ discounted Ms. Thomas's opinion, finding it "vague," specifically
9 because it did not address any of plaintiff's functional limitations and her use of the word
10 "may" rendered plaintiff's ability to work "inconclusive." See AR 70.

11 As discussed above, supportability and consistency are the two most important
12 factors when considering a medical opinion. 20 C.F.R. § 404.1520c(a). The regulations
13 further provides that a medical opinion's persuasiveness relies on the relevance of the
14 medical evidence by which the medical source support his or her opinion. 20 C.F.R. §
15 404.1520c(c)(1). Here, Ms. Thomas's opinion simply states plaintiff's fibromyalgia
16 diagnosis, lists the symptoms associated with fibromyalgia and its possible effect on
17 plaintiff's job performance, and generally describes plaintiff's response to certain
18 medication. AR 806. Because Ms. Thomas's opinion lacks supportability as required
19 under the new regulations, the Court finds the ALJ reasonably discounted her opinion
20 and did not err in doing so.

21 2. Medical Opinions of Dr. Jim Tackach and Dr. Harrison

22 On August 31, 2019, Dr. Jim Tackach assessed plaintiff's RFC. AR 115–17. He
23 assigned several exertional, postural, and environmental limitations, and assessed,
24 "expect function at SEDENTARY exertion with compliance." AR 115. On January 14,
25 2020, Dr. William Harrison also assessed plaintiff's RFC. AR 131–33, 144–46. He also
assigned several exertional, postural, and environmental limitations, and assessed,

1 “Review of old and new MER affirms previous rating of projected Sedentary RFC w
2 limits.” AR 146. The ALJ found these opinions persuasive, but plaintiff contends the
3 doctors’ opinions lacked supportability and consistency because they did not consider
4 plaintiff’s medical records after January 2020, or her testimony. See Dkt. 13, p.10; AR
5 70.

6 But in finding their opinions persuasive, the ALJ considered medical records after
7 January 2020. See AR 886, 950, 1013, 1017, 1052, 1070-78. Further, the treatment
8 notes show plaintiff reported abdominal pain, constipation, and overall body pain and
9 fatigue – consistent with plaintiff’s testimony. Therefore, the ALJ’s decision is supported
10 by substantial evidence. *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) Accordingly,
11 the Court finds the ALJ did not err in evaluating the medical opinion evidence.

12 C. Whether the ALJ Erred in Evaluating Plaintiff’s Subjective Symptom Testimony

13 The ALJ’s determinations regarding a claimant’s statements about limitations
14 “must be supported by specific, cogent reasons.” *Reddick v. Chater*, 157 F.3d 715, 722
15 (9th Cir. 1998) (*citing Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990)). In
16 assessing a Plaintiff’s credibility, the ALJ must determine whether Plaintiff has
17 presented objective medical evidence of an underlying impairment. If such evidence is
18 present and there is no evidence of malingering, the ALJ can only reject plaintiff’s
19 testimony regarding the severity of his symptoms for specific, clear and convincing
20 reasons. *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (*citing Lingenfelter v.*
21 *Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007)).

22 Plaintiff testified that she is unable to work because of fibromyalgia, tremors, and
23 the effects of her hysterectomy. AR 91-92. She explained that her hysterectomy has
24 “limited certain things” that she is able to do, including being with her children and
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1 cutting up her food. AR 91. She explained that she experiences daily pain from
2 fibromyalgia and that she feels it “everywhere,” describing it was “burning” and “achy.”
3 See AR 92. As a result, plaintiff states she cannot sit or stand for longer than ten
4 minutes and has to change positions to keep her body moving. AR 93–94.

5 Plaintiff also states she can only walk for five to six minutes before she needs to
6 take a break. AR 94. She testified that when she has tremors, her entire body shakes,
7 and often she experiences tingling and numbness in her hands and feet. AR 97. As a
8 result, plaintiff states she cannot cut food or hold on to things, and it is hard for her to
9 write. AR 97-98. According to plaintiff, the pain she experiences makes it difficult for her
10 to focus or concentrate, at least two to three times per day. AR 97-99.

11 As to her mental health, plaintiff testified to PTSD and anxiety. AR 99. Because
12 of these symptoms, plaintiff states she cannot deal with loud noises, she cannot be
13 around more than five people, and she cannot drive. AR 99–100.

14 1. Physical Symptom Testimony

15 The ALJ discounted plaintiff’s testimony of her physical symptoms because (1) of
16 her conservative treatment, (2) the lack of physical examinations showing “significant
17 exacerbations of fibromyalgia,” and (3) plaintiff was able to work with her impairments
18 prior to her alleged onset date. AR 67.

19 With regards to the ALJ’s first reason, evidence that medical treatment helped a
20 claimant “‘return to a level of function close to the level of function they had before they
21 developed symptoms or signs of their mental disorders’ . . . can undermine a claim of
22 disability.” *Wellington v. Berryhill*, 878 F.3d 867, 876 (9th Cir. 2017) (quoting 20 C.F.R.
23 pt. 404, subpt. P, app. 1 (2014)). But here, the ALJ fails to identify which of plaintiff’s
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1 treatment notes undermines her testimony, and does not explain how plaintiff's
2 conservative treatment has rendered her able to work. It is not the role of the reviewing
3 court to comb the administrative record and identify specific conflicts. *Burrell v. Colvin*,
4 775 F.3d 1133, 1138 (9th Cir. 2014). The ALJ has failed to direct the Court to the
5 evidence, thus the Court cannot properly determine whether the ALJ properly
6 discounted plaintiff's testimony.

7 Regarding the ALJ's second reason, "[c]ontradiction with the medical record is a
8 sufficient basis for rejecting the claimant's subjective testimony." *Carmickle v. Comm'r*,
9 *Soc. Sec. Admin.*, 533 F.3d 1155, 1161 (9th Cir. 2008) (citing *Johnson v. Shalala*, 60
10 F.3d 1428, 1434 (9th Cir.1995)). But here, the records cited by the ALJ do not
11 necessarily contradict plaintiff's testimony.

12 The ALJ first pointed to a treatment note stating plaintiff is able to get in and out
13 of a car and put on her socks and shoes, but this does not explain how plaintiff's
14 movement in and out of a car or putting on socks and shoes would contradict plaintiff's
15 statements about her inability to work. See 587. Further, the same treatment notes that
16 are cited by the ALJ also include a statement that plaintiff's complaint regarding her
17 "widespread myofascial type pain" had not changed. See *id.*

18 The ALJ also identified treatment notes from 2019 stating plaintiff experienced
19 some relief from medication -- but later treatment notes show plaintiff "didn't achieve
20 any fair control" or that "no effective treatment" exists as to plaintiff's fibromyalgia. AR
21 812–14 , 863, 865. The ALJ also identified a treatment note stating it was unclear if
22 plaintiff was "putting max effort" in her strength testing, and normal musculoskeletal and
23 range of motion. AR 67. But fibromyalgia is an "unusual" disease for which "there is an
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1 absence of symptoms that a lay person may ordinarily associate with joint and muscle
2 pain. The condition is diagnosed entirely on the basis of the patients' reports of pain and
3 other symptoms." *Revels v. Berryhill*, 874 F.3d 648, 656 (9th Cir. 2017) (internal
4 citations and quotation marks omitted). Here, the record shows, and ALJ acknowledged,
5 that plaintiff repeatedly reported such symptoms. AR 474, 587, 1031, 1052. Given these
6 reports, the Court cannot say the ALJ properly discounted plaintiff's testimony regarding
7 her fibromyalgia.

8 In discounting plaintiff's testimony regarding the effects of her hysterectomy, the
9 ALJ cited several physical examinations showing "unremarkable" results. AR 68.
10 However, the notes also included plaintiff's continued reports that she experienced
11 abdominal pain and severe constipation. AR 784–85, 886–88, 950–51, 1055. Further,
12 the record indicates plaintiff's supracervical hysterectomy may have contributed to her
13 urologic symptoms, including pelvic pain. AR 1077. Plaintiff was ultimately
14 recommended and admitted for a total hysterectomy to address the symptoms. AR
15 1071–77. Given these findings, the ALJ erroneously discounted plaintiff's testimony
16 regarding the pain she experiences from her hysterectomy.

17 Finally, with regards to the ALJ's third reason, an ALJ may discount a claimant's
18 testimony if the evidence shows a claimant was able to work despite experiencing
19 symptoms. See *Sadeeq v. Colvin*, 607 F. App'x 629, 631 (9th Cir. 2015); *Alexander v.*
20 *Comm'r of Soc. Sec.*, 373 F. App'x 741, 744 (9th Cir. 2010). Yet when a claimant has
21 fibromyalgia, it is important to consider the patients' reports of pain and other
22 symptoms. *Revels*, 874 F.3d at 656. The record shows plaintiff continued to report pain
23 because of her fibromyalgia while she was working. AR 474, 488. Further, some of the
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1 cited treatment notes show that even prior to the alleged onset date state plaintiff was
2 *not* working while experiencing the symptoms, undermining the ALJ's finding. See AR
3 516. The Court, therefore, finds that the ALJ did not reasonably discount plaintiff's
4 testimony as to her physical symptoms.

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6 2. Mental Health Symptoms

7 The ALJ discounted plaintiff's testimony regarding her mental health symptoms
8 because: (1) the record showed a lack of mental health treatment, and (2) she
9 responded well to medication. AR 68.

10 With regards to the ALJ's first reason, "an 'unexplained, or inadequately
11 explained, failure to seek treatment' may be the basis for an adverse credibility finding
12 unless one of a 'number of good reasons for not doing so' applies." *Orn v. Astrue*, 495
13 F.3d 625, 638 (9th Cir. 2007) (quoting *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir.
14 1989)). Here, the ALJ pointed out that after three appointments with her mental health
15 providers, plaintiff was discharged after they were unable to contact her. AR 555.

16 Plaintiff points out "it is a questionable practice to chastise one with a mental
17 impairment for the exercise of poor judgment in seeking rehabilitation," *Nguyen v.*
18 *Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996) (quoting *Blankenship v. Bowen*, 874 F.2d
19 1116, 1124 (6th Cir. 1989)), but this is a general statement rather than specific to her
20 situation -- plaintiff provides no citation to the record that would offer facts showing why
21 she could not make it to her sessions.

22 Further, the ALJ also reasonably discounted plaintiff's testimony because the
23 record shows she responded well to medication. AR 70. In July 2019, plaintiff was
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1 reported to have “responded well to Abilify, as regards depression/anxiety.” AR 582.
2 Additionally, in a September 2020 patient health questionnaire, plaintiff indicated no
3 trouble with concentration. AR 967. She also reported that her concentration and her
4 anxiety would not greatly affect her ability to do work, take care of things at home, and
5 get along with other people. AR 967. Given these findings showing plaintiff improved in
6 her medication and that she herself reported that her concentration and anxiety would
7 not have much impact on her working and interacting ability, the ALJ could reasonably
8 discount plaintiff’s mental health testimony.

9 Harmless Error

10 An error is harmless only if it is not prejudicial to the claimant or “inconsequential”
11 to the ALJ’s “ultimate nondisability determination.” *Stout v. Comm’r Soc. Sec. Admin.*,
12 454 F.3d 1050, 1055 (9th Cir. 2006).

13 In this case, the ALJ’s errors were not harmless because a proper evaluation
14 plaintiff’s testimony regarding her physical symptoms could change the ALJ’s
15 assessment of plaintiff’s RFC and may affect the hypotheticals provided to the VE.

16 D. Whether the ALJ’s RFC Determination Was Supported by Substantial Evidence

17 The ALJ committed harmful error, necessitating the ALJ’s reassessment
18 plaintiff’s testimony, and thus plaintiff’s RFC is not supported by substantial evidence.
19 See *Valentine v. Comm’r Soc. Sec. Admin.*, 574 F.3d 685, 690 (9th Cir. 2009) (“an RFC
20 that fails to take into account a claimant’s limitations is defective”).

21 CONCLUSION

22 Based on the foregoing discussion, the Court finds the ALJ harmfully erred in the
23 decision finding plaintiff to be not disabled. Defendant’s decision to deny benefits
24 therefore is REVERSED and this matter is REMANDED for further administrative

1 proceedings. The ALJ is directed to reassess plaintiff's testimony as to her physical
2 symptoms.

3 Dated this 14th day of September, 2022.

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Theresa L. Fricke
7 United States Magistrate Judge
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